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No. 87-5468

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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SUPREME COURT, U.S.

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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November 23, 1987

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In opposing certiorari Mississippi does not argue that the decision below was correct; it argues instead that neither a death sentence based on a subsequently invalidated prior conviction nor the refusal of the Mississippi Supreme Court to recognize the decision of the New York Court of Appeals vacating that conviction raises a federal question. We believe that these issues -- and the other issues raised by this case -- are important and warrant review by this Court. A death sentence based on a subsequently invalidated prior conviction violates the Eighth and Fourteenth Amendments and is not a matter of state law only.

1. This Court has before it a petition for a writ of certiorari to review the decision in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3290 (U.S. Sept. 21, 1987) (No. 87-519), where the

Tenth Circuit, sitting en banc, held unanimously that under Zant v. Stephens, 462 U.S. 862 (1983), a death sentence must be vacated if one aggravating circumstance is invalidated and that invalid circumstance was weighed by the jury at sentencing.

The Mississippi capital sentencing statute is in all material respects the same as the Oklahoma statute construed in Cartwright. The facts in Cartwright are less egregious than those here, since the aggravating circumstance found by the jury in Johnson's case rests upon impermissible evidence of an unconstitutional prior conviction that could not have been considered for enhancement purposes even in a non-death case. See United States v. Tucker, 404 U.S. 443, 444-45 (1972); Townsend v. Burke, 334 U.S. 736, 740-41 (1948). Contrary to Mississippi's argument (Brief in Opp. 4, 11-12), reliance on an unconstitutional prior conviction at sentencing violates due process.

Johnson's attack upon the validity of the "especially heinous, atrocious or cruel" aggravating circumstance is also more compelling on the facts than the attack on that same aggravating circumstance in Cartwright, since the jury that sentenced Johnson did not receive any instruction about what this aggravating circumstance is supposed to mean, while the jury in Cartwright received the Oklahoma Uniform Jury Instruction taken from Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

2. While it acknowledges that the New York conviction was subsequently vacated and there was thus no evidence to support the "prior violent felony conviction" aggravating circumstances found by the jury, Mississippi argues that the

reliance on an invalid aggravating circumstance at sentencing does not require reversal because no federal question is presented (Brief in Opp. 5) and because the "interpretation of aggravating circumstances is purely a matter of state law" (Brief in Opp. 11-12). Mississippi's argument ignores this Court's plain statement in Zant v. Stephens, supra, 462 U.S. at 885, that some kinds of evidence are so inherently prejudicial that reliance on that evidence to impose a death sentence requires automatic reversal, whether or not other valid aggravating circumstances are present:

> "Nor has Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness . . . . If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside." (Emphasis supplied)

In this case, as the transcript shows and Mississippi does not dispute, the prosecution made more than 22 separate references to Johnson's 1963 New York conviction at sentencing. (Pet. 7; R. 2271-79; 2282-87). No evidence with respect to any other aggravating circumstance was introduced at sentencing, and the prosecutor barely mentioned the other two circumstances in his argument to the jury. The jury was told that Johnson had a propensity for violence that was proved by his prior conviction for what was repeatedly called "second degree assault with intent to commit first degree rape" -- a crime that has never existed in New York despite what Mississippi continues to say (contrast Pet. 7-8 with Brief in Opp. 7, 12).

None of the cases that Mississippi cites (Brief in Opp. 11) supports its reading of Zant -- a reading that would permit the prosecution to rely at sentencing on evidence that is constitutionally inadmissible and "totally irrelevant to the sentencing process," Zant, 462 U.S. at 885, so long as it could establish one valid aggravating circumstance. No case cited by Mississippi involved the introduction of constitutionally inadmissible evidence to establish an invalid aggravating circumstance.[1] The rule is the other way. Tucker and Townsend establish that where, as here, the sentencer relies on an invalid prior conviction or other "misinformation" of constitutional magnitude, the sentence must be set aside. See, e.g., United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970) ("Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process"). See also United States v. Messer, 785 F.2d 832 (9th Cir. 1986); Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); United States v. Robin, 545 F.2d 775 (2d Cir. 1976); United States v. Stein, 544 F.2d 96 (2d Cir. 1976).

3. Mississippi also argues that Johnson did not challenge the validity of the New York conviction at his 1982

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1 Despite Mississippi's repeated citation of and extension quotation from Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987), that case did not find any invalid aggravating circumstance, much less one based on highly prejudicial evidence of an invalid prior conviction.

Mississippi trial or on direct appeal and that his claim is therefore barred under Mississippi law (Brief in Opp. 10). There are two fatal flaws in this argument.

First, under settled Mississippi law a defendant seeking to challenge the validity of an out-of-state conviction used in Mississippi to enhance a sentence must succeed in setting aside the challenged conviction in the jurisdiction where it was entered before he can seek relief in Mississippi. In Phillips v. State, 421 So. 2d 476, 482 (Miss. 1982), the Mississippi Supreme Court expressly ruled that a defendant must bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis." That is exactly what Johnson did here. There is no procedural bar here, since, in the words of the Mississippi post-conviction review statute, the bar applies only to the failure to raise issues "which were capable of determination at trial and/or on direct appeal." Miss. Code Ann. § 99-39-21(1) (Supp. 1986) (emphasis supplied).[2] Having made the strategic choice to rely on a 20-year old out-of-state conviction which it blindly accepted and chose not to investigate, Mississippi is in no position to invoke a newly minted procedural bar rule after its sister state, pursuant to the procedures contemplated in Phillips, has vacated the conviction.[3]

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2 In opposing post-conviction relief, the State did not argue below that petitioner's claim based on the invalid 1963 New York conviction was procedurally barred.

3 Except for setting out a long quotation from the opinion below (Brief in Opp. 8-9) Mississippi ignores the fact

(Footnote continued on next page)

Second, the Mississippi Supreme Court has no clearly announced or strictly followed procedural bar rules, but has routinely considered issues not raised on direct appeal in post-conviction proceedings. In Wheat v. Thigpen, 793 F.2d 621, 625 n.3 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987), the Fifth Circuit exhaustively reviewed the Mississippi Supreme Court's invocation of procedural bar in death cases and found that the Mississippi Supreme Court has "repeatedly ignored its rule prohibiting the raising of claims for the first time on writ of error coram nobis, if in fact the rule existed." The Fifth Circuit noted that federal district courts sitting in Mississippi have held that the Mississippi Supreme Court's procedural bar rules do not constitute an adequate and independent state ground and found its "affection for procedural bars to be particularly unseemly." 793 F.2d at 626-27 n.5.

4. This Court has never considered whether a state may use a prior conviction in a sister state to enhance a criminal sentence -- much less to put a defendant to death -- and at the same time refuse to recognize a subsequent decision by the sister state vacating that same conviction. The issue

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(Footnote continued from preceding page)

that Johnson followed the procedure set out in Phillips. A portion of that quotation attempts to distinguish Phillips, arguing that introducing evidence of an invalid prior conviction to show defendant to be a habitual criminal is error because in such a case the judge must impose the maximum sentence for the later conviction but that no error is involved in putting an invalid prior conviction before the jury in a capital case because the jury is nonetheless free not to impose a death sentence. The distinction lacks all logic and is plainly made up for this occasion.

presented is serious and important, not only because death is a qualitatively different punishment but because the failure to give full faith and credit permits Mississippi to impose any form of enhanced punishment on the basis of a conviction later determined to be a nullity. If Johnson's 1963 New York conviction had been reversed prior to his 1982 trial in Mississippi, the full faith and credit clause would have prohibited Mississippi from introducing that conviction as an aggravating circumstance. The fact that the conviction was not reversed until after the 1932 trial should make no difference, particularly since, as explained in the amicus brief filed by the Attorney General of the State of New York in support of the petition, the reversal occurred on direct appeal in New York because Johnson had earlier been denied his right to appeal (N.Y. Att. Gen. Brief 9-14).

In denying post-conviction relief in this case, the Mississippi Supreme Court stated emphatically that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition" (Pet. 7a; 511 So. 2d at 1338).[4] Nonetheless, Mississippi argues here that the Mississippi Supreme Court did not refuse to give full faith and credit to the judgment of the New York Court of Appeals (Brief in Opp. 12), and that even if it did deny full faith and credit, this "would not have changed the outcome of the decision of the court below" (Brief in Opp. 13) because Johnson's death sentence is supported by other aggravating circumstances that do not depend on full faith and credit.

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4 The opinion of the court below is now officially reported as Johnson v. State, 511 So. 2d 1333 (Miss. 1987).

Beyond ignoring the rule of Tucker and Townsend that there must be resentencing whenever materially untrue information about a prior criminal record is considered by the sentencer, Mississippi's argument simply reads full faith and credit out of the Constitution on a local option basis.

5. The Fifth Circuit has determined, after a comprehensive review of the Mississippi cases, that the Mississippi Supreme Court does not apply any limiting construction to the "especially heinous, atrocious or cruel" circumstance. See Johnson (Edward Earl) v. Thigpen, supra, 806 F.2d at 1246-47. Mississippi appears to be one of only three states that do not require the sentencing judge to give any instruction explaining or limiting this circumstance. The failure to channel the jury's discretion by either a limiting construction or a limiting instruction renders the "especially heinous, atrocious or cruel" aggravating circumstance unconstitutional as applied in Mississippi.[5] See Cartwright v. Maynard, supra, 822 F.2d at 1491 (invalidating Oklahoma's "especially heinous, atrocious or cruel" circumstance as applied); Proffitt v. Florida, supra, 428 U.S. at 255-56; cf. Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) ("wanton or vile" circumstance unconstitutionally vague because its meaning "can only be the subject of sheer speculation"). In Commonwealth of

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5 There can be no question that this issue has been properly preserved. Johnson's lawyers objected to the use of the "especially heinous, atrocious or cruel" aggravating circumstance at trial, raised it as an issue on his direct appeal, and raised it again in his petition for post-conviction relief; Mississippi does not contend otherwise here. There is no requirement under the Mississippi post-conviction review statute or in this Court's authorities that a defendant seek certiorari on each issue raised on direct appeal in order to preserve each such issue for post-conviction review. Cf. Hawthorn v. Lovorn, 457 U.S. 255, 261 (1982); Reece v. Georgia, 350 U.S. 85, 87 (1955).

Pennsylvania v. Nelson, 523 A.2d 728, 737 (Pa. 1987), cert. denied, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987), the Supreme Court of Pennsylvania held that the failure to instruct the jury on the meaning of "torture" as an aggravating circumstance required the reversal of a death sentence, because the "use of the word 'torture' without further elaboration of that term" did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" citing Godfrey v. Georgia, supra, 446 U.S. at 428.

CONCLUSION

For the reasons stated above and in our petition for certiorari, the writ should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The State of New York, by its Attorney General, Robert Abrams, submits this brief *amicus curiae* pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's petition for a writ of certiorari to the Supreme Court. Mr. Johnson was convicted of murder in a Mississippi court and sentenced to die. One of the aggravating circumstances cited by the jury as justification for the death penalty was Mr. Johnson's previous conviction in New York for assault in the second degree.

The Mississippi Supreme Court upheld the sentence although the New York Court of Appeals had vacated Mr. Johnson's

conviction and dismissed the underlying indictment subsequent to the Mississippi trial. In refusing to give full faith and credit to the New York court's vacatur and dismissal, the Mississippi court made crucial mistakes concerning applicable New York law and the nature of the proceedings leading to the Court of Appeals' action.

Because the consequences of Mississippi's refusal to recognize the validity of the New York court's vacatur are so grave and because the reasons for the refusal call into question the integrity of the New York court proceedings, the Attorney General submits this brief in order to clarify the record before this Court.

SUMMARY OF ARGUMENT

Full faith and credit considerations require that if a state chooses to use another state's convictions to enhance its criminal penalties, it must give equal recognition to a sister state's vacaturs. In fact, both New York and Mississippi law call for evenhanded recognition of sister states' judgments and vacaturs.

In refusing to recognize the New York Court of Appeals' vacatur of Johnson's 1963 conviction, the Mississippi Supreme Court made crucial errors concerning New York law. It characterized the New York conviction as final despite the New York court's ruling that it was the unappealed judgment of a trial court and that the state's actions had prevented Johnson from exercising his right to appeal. The Court of Appeals' vacatur was in accordance with settled principles of New York law.

The Mississippi Supreme Court also mischaracterized the New York Court of Appeals' vacatur as a ruling on a collateral relief petition. In fact, the New York trial court was initially petitioned by Johnson for post-conviction relief. However, when it ordered a resentencing nunc pro tunc, the proceeding was converted to a direct appeal.

Further, Mississippi implied that the post-conviction relief proceedings in New York were not truly adversarial. In fact, the

district attorney in Monroe County actively opposed all of Johnson's substantive claims and the Appellate Division denied relief. The only point which the prosecutor conceded was that Johnson had been denied his right to appeal through the state's misfeasance. In so conceding, the prosecutor was fulfilling his ethical obligation to see that justice was done.

STATEMENT OF CASE

In a per curiam opinion this year, the New York Court of Appeals vacated Johnson's 1963 conviction and dismissed the underlying indictment, holding that he had been denied his constitutional right to appeal:

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987).

Additionally, New York's high court concluded that the interests of justice would not be served by a new trial since "... the records of defendant's trial have been lost, ... neither reconstruction nor a new trial is possible and ... defendant has raised appealable issues with possible merit." 69 N.Y.2d at 342.

In 1963 Johnson, then a resident of Monroe County, New York, was convicted of assault in the second degree. He was sentenced to a prison term of 1½ – 3 years and served one year before being paroled. Johnson was not advised at sentencing by either his lawyer or the court of his right to appeal, *id.* at 341, a failure which under New York law entitles a defendant to resentencing so he may appeal. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).[1]

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[1] The New York Court of Appeals has applied *Montgomery* retroactively. *See infra* pp. 10-11.

When he discovered that he had the right to appeal, Johnson repeatedly petitioned for permission to do so, but his attempts were thwarted several times. *People v. Johnson*, 69 N.Y.2d at 341. In 1967 he filed a *pro se* notice of appeal. (A. 1)[2] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. (A. 2)

Between 1967 and 1971 Johnson filed two *pro se* petitions alleging a denial of his right to appeal. These applications were denied, and Johnson filed a notice of appeal from one of these denials. (A. 3-10) The Monroe County public defender's office was appointed to represent Johnson on the appeal, but that office never perfected the appeal, a failure which it later admitted. (A. 11) Thus, as it stood in 1986, Johnson's 1963 conviction was the unappealed judgment of a trial court.[3]

In 1982 in Mississippi, Johnson was convicted for capital murder and sentenced to death. The jury found three aggravating circumstances justifying imposition of the death penalty, but the one relied on most heavily by the prosecution was Johnson's 1963 assault conviction in New York.[4]

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[2] "A. ____" references are to documents appended hereto which were typset from handwritten and typewritten documents contained in the Joint Appendix submitted to the New York Court of Appeals by the Monroe County District Attorney and Johnson's attorneys.

[3] Article 460 of the New York Criminal Procedure Law (McKinney 1983) governs the taking and perfecting of appeals. In an appeal as of right, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 1983). N.Y. Crim. Proc. Law § 460.30 (McKinney 1983), discussed at p. 10 below, provides for extensions of time for taking an appeal. As of 1986, however, Johnson's notice of appeal was not filed.

[4] The Mississippi Supreme Court said that the admission of the assault conviction as an aggravating circumstance could not be considered harmless error since it was heavily relied upon by the prosecutor in seeking the death penalty. *Johnson v. State*, DP No. 43, slip op. at 6 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post-conviction relief).

After Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court, *Johnson v. State*, 477 So.2d 196 (Miss. 1985), he petitioned this Court for a writ of certiorari which was denied, *Johnson v. Mississippi*, 106 S. Ct. 1958 (1986) (Brennan and Marshall, J.J., dissenting). His petition for rehearing was also denied. *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 *et seq.* (Supp. 1986), and on August 4, 1986 the Mississippi Supreme Court granted a stay of execution (then scheduled for August 6, 1986). Simultaneously, Johnson again attacked his New York conviction in the New York courts. On July 30, 1986, Johnson amended his petition for post-conviction relief in Mississippi to reflect the New York Court of Appeals decision vacating his 1963 conviction and dismissing the indictment. In so doing, Johnson was following Mississippi law. To determine if a prior conviction in another state is constitutionally valid, Mississippi law requires a defendant to challenge the conviction in the other state:

> [A]ny such proceeding should be brought in the foreign state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis. *Phillips v. State*, 421 So.2d 476 (Miss. 1982) at 481-482.

On May 27, 1987 the Mississippi Supreme Court held that despite New York's vacatur of the 1963 conviction, Johnson was not entitled to resentencing. *Johnson v. State*, DP No. 43, slip op. at 9. The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." Slip op. at 7. Further, the Mississippi court found that the New York proceedings were not "adversarial" because the State's

attorney had "no significant interest or concern in vouchsafing the validity of his [Johnson's] 1963 conviction . . ." Slip op. at 8.

In a dissenting opinion joined by two judges, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987 order should be given less than full faith and credit." Slip op. at 19. The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." Slip op. at 23.

The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, DP No. 43 (Miss. July 15, 1987).

ARGUMENT

I. IT IS A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION FOR ONE STATE TO RECOGNIZE A SISTER STATE'S CONVICTIONS FOR ENHANCEMENT OF ITS OWN CRIMINAL PENALTIES BUT REFUSE TO RECOGNIZE A SISTER STATE'S VACATURS IN THE SAME CONTEXT

The New York Court of Appeals vacated the petitioner's 1963 conviction, which was the principal aggravating circumstance supporting the death penalty in this case. The Mississippi Supreme Court's refusal to recognize the decision of New York's highest court declaring a New York conviction invalid violated the full faith and credit clause of the Constitution. Art. IV, § 1. That clause "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." *Milliken v. Meyer*, 311 U.S. 457, 462 (1941). The wisdom of this holding is demonstrated by this case, where the decision of the Mississippi court misapprehends the law of New York as well as the facts concerning the New York proceedings.

The full faith and credit clause of the Constitution, U.S. Const. art. IV, § 1, declares a national policy of respect and recognition for a state's judgments by sister states. This policy is considered central to our federal system. *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691 (1982). Underlying this policy is a recognition of the need to develop a national jurisprudence and to prevent endless relitigation of issues. "[T]he judgment of a state court should have the same credit, validity and effect in every other court of the United States, which it had in the state where it was pronounced." *Id.* (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)). *See also Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (purpose of the clause is to "help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum.")

Although there may be no constitutional requirement that one state use another state's convictions to enhance punishment of habitual offenders, once a state chooses to do so, full faith and credit considerations require giving equal recognition to a sister state's vacaturs. New York and Mississippi both have sentencing statutes which enhance punishment of habitual offenders for prior convictions. Mississippi Code Ann. § 49-19-81 (Supp. 1982); N.Y. Penal Law § 70.06(1)(b)(i) (McKinney Supp. 1987), § 70.10(1)(b) (McKinney 1975). Both also have mechanisms to challenge convictions after they are used as enhancements and to provide for reductions of punishment if a challenge is effective.

In this case, Mississippi used a New York conviction to enhance a sentence — in fact, to impose the death penalty. Mississippi now refuses to respect New York's vacatur of the same conviction, apparently because it disagrees with the outcome. Yet the Mississippi Supreme Court held in a similar case that a defective prior conviction which is used for enhancement is voidable, and a successful challenge in a sister state should result in relief

from the habitual offender status in Mississippi. *Phillips v. State*, 421 So.2d 746 (Miss. 1982).[5]

There are limitations on the scope of the full faith and credit clause but they do not apply here. For instance, a state need not enforce a foreign state's criminal judgments. *Nelson v. George*, 399 U.S. 224 (1938); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265 (1888). However, the habitual offender statutes merely require recognition of a sister state's penal judgments, not enforcement of a penal law. The rationale for this exception is that the sovereignty of each state entitles it to decide what conduct is prohibited within its boundaries.

Those states which have grappled with the effect to be given a sister state's criminal judgments have found that the full faith and credit clause supports recognition of such judgments. For instance, in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985) the New York Court of Appeals recently held that the full faith and credit clause required New York to give the same effect to a New Jersey criminal judgment as New Jersey had done. In so doing, that court emphasized the distinction between enforcing a sister state's penal laws and giving effect to that state's judgment. *See also, Kellogg v. State*, 504 P.2d 440 (Okla. Crim. App. 1972) in which the Oklahoma court held that it would be required to recognize a vacatur of a sister state whose conviction it had used, although ruling that a pardon was not a vacatur.

Thus, the full faith and credit clause required Mississippi to recognize New York's vacatur of petitioner's 1963 conviction.

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[5] New York also allows a defendant to challenge the use of a prior conviction to enhance sentences on subsequent felonies. *People v. Wilkins*, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971); N.Y. Crim. Proc. Law § 400.20 (McKinney 1983). A successful challenge either in New York or in a sister state will result in a reduced sentence in New York.

New York recognizes other state's post-conviction vacaturs as well as their convictions. *See, e.g., People v. Willis*, 79 A.D.2d 1036, 435 N.Y.S.2d 38, (App. Div. 1981) where the Appellate Division, Second Department, vacated an

(Footnote continued)

II. THE MISSISSIPPI SUPREME COURT SERIOUSLY MISREPRESENTED NEW YORK LAW IN ITS DECISION NOT TO HONOR THE COURT OF APPEALS' VACATUR.

The Mississippi Supreme Court's refusal to give full faith and credit to the New York vacatur of the conviction is attributable to the court's failure to understand the nature of the proceedings that led to the reversal of the conviction and the history of Johnson's efforts to vacate his conviction.

The Mississippi Supreme Court's fundamental confusion about the New York law under which the 1963 conviction was vacated is revealed when it states:

> [I]n this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition. *Johnson v. State*, DP No. 43, slip op. at 7.

In so ruling, the Mississippi court substantially misrepresented New York law. It misconstrued New York's law on untimely appeals, it mischaracterized the vacatur as a ruling on a collateral relief petition rather than one on a direct appeal and it mistakenly considered the 1963 conviction as

A.

The Mississippi court's failure to understand that the New York Court of Appeals acted on a direct appeal indicates its

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enhanced sentence because of pos.-conviction proceedings in Texas. Texas dismissed an indictment which had been used to enhance Willis' sentence in New York. The Appellate Division followed Texas law in its decision. "In view of the interpretation given by the State of Texas to its own statute, we hold that upon the withdrawal of the defendant's guilty plea and the dismissal of the indictment against him, he reverted to the status of a first felony offender." *Willis*, 79 A.D.2d at 1037.

ignorance about the New York courts' long-standing protection of the right to appeal.

The right to appeal a criminal conviction which Johnson sought is an interest of paramount importance in New York. As the Court of Appeals, by then Judge Fuchsberg, clearly stated:

> In New York State, every defendant has an absolute and fundamental right to appeal a conviction. The denial of that right constitutes as much a failure of due process as would the denial of the right to a trial itself, and where its denial or serious obstruction comes about because of poverty, it constitutes a denial of equal protection as well. *People v. Rivera*, 39 N.Y.2d 519, 522, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) (citations omitted).

Indeed, the right to appeal is so important that under some circumstances, appeals will be allowed notwithstanding long lapses of time. *People v. Montgomery*, 24 N.Y.2d 130. For example, the right to appeal out of time has been allowed in cases where the defendant's right to appeal was denied through no fault of his own. Thus, in *People v. Hairston*, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961) an out-of-time appeal was allowed because uncooperative prison officials had prevented a defendant from filing a timely notice of appeal. Similarly, in *People v. Callaway*, 24 N.Y.2d 127, 247 N.E.2d 128, 299 N.Y.S.2d 154 (1969) an out-of-time appeal was allowed because the defendant relied on assigned counsel's assurance that an appeal would be taken.

Recognizing the importance of a defendant's right to appeal, the New York Legislature codified *Montgomery* in 1971. N.Y. Crim. Proc. Law § 460.30 (McKinney 1983); *see also* Bellacosa, Practice Commentary McKinney's Consolidated Laws of N.Y. Crim. Proc. Law § 460.30 at 34. Although this section includes a one year extension of time in which to take an appeal, the Court of Appeals has held that it does not impose an absolute bar to appeals taken beyond the one year extension, especially where a defendant has made efforts to take a timely appeal. *People v. Johnson*, 69 N.Y.2d 339, *People v. Thomas*, 47 N.Y.2d

37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979). Thus, here, where Johnson made persistent efforts to appeal his conviction and appointed counsel and court personnel failed to assist him to perfect in a timely manner, the New York Court of Appeals' reversal of Johnson's conviction is consistent with well settled law in this state.

The New York Court of Appeals has fashioned different relief according to the facts of each case in which an appeal was not timely filed or perfected. In *People v. Montgomery*, 24 N.Y.2d 130 and *People v. Rivera*, 39 N.Y.2d 519, the Court of Appeals held that where a defendant's right to appeal had been dissipated by a court-appointed attorney's failure to file or prosecute an appeal or where the defendant had not been advised of his right to appeal, defendant was entitled to resentencing nunc pro tunc so that the time for appeal would run anew. *Montgomery*, 24 N.Y.2d at 134; *Rivera*, 39 N.Y.2d at 521-522.

Johnson's case was decided in accordance with *Montgomery* and *Rivera*. In *Rivera*, the Court of Appeals reversed a 23 year old conviction for reasons strikingly similiar to those in this case. The defendant had not been advised of his right to appeal at sentencing in 1953, and was resentenced nunc pro tunc in 1973. However, after resentencing, he could not appeal because no record of his trial existed and the trial transcript was unavailable. The case was therefore remitted for a new trial.

Johnson made a motion pursuant to N.Y. Crim. Proc. Law § 440.10[*] to vacate his conviction in Monroe County on July 30, 1986 in accordance with the procedure set forth in *Montgomery*.

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[*] N.Y. Crim. Proc. Law § 440.10 (McKinney, 1983), entitled Motion to Vacate Judgment, states in pertinent part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> . . .
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

His primary claim was that the conviction was invalid because he was not told of his right to appeal when he was sentenced.[7] On October 29, 1986, the Monroe County court granted the motion to the extent that it ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. From that point the New York procedures were pursuant to direct appeal, not *coram nobis*. *People v. Johnson*, Index 32/36 (County Court, Monroe Ct. Oct. 29, 1986). Resentencing under these circumstances necessarily raised for review the conviction from which the appeal was taken. *See People v. Callaway*, 24 N.Y.2d 127; *People v. Hairston*, 10 N.Y.2d 92.

Johnson then appealed his conviction to the intermediate appellate court — the Appellate Division, Fourth Department. That court held that Johnson was procedurally barred from appeal. *People v. Johnson*, 125 A.D. 2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986). Johnson sought and was granted leave to appeal to the Court of Appeals. Thus, the New York court vacated Johnson's 1963 conviction on direct appeal in accordance with its precedents. *People v. Johnson*, 69 N.Y.2d 339.[8]

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[7] Besides claiming that he had been unconstitutionally denied his right to appeal, Johnson's 1986 motion pursuant to New York Crim. Proc. Law § 440.10 (McKinney 1983) included two other claims: that no hearing was held on the voluntariness of his confession, and that the alleged confession resulted from post-indictment interrogation without the presence of counsel.

[8] Under New York law, a vacatur on a collateral attack is equivalent to one on a direct appeal. While Johnson's appeal was begun procedurally as a *coram nobis* petition, the ultimate ruling was on a direct appeal. The question, however, of what procedure was used to obtain the vacatur is a distinction without a difference under New York law. Contrary to what the Mississippi court has suggested, a conviction which has been vacated pursuant to a petition under N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) is as much a nullity as one vacated pursuant to a direct appeal. *People v. Cooks*, 67 N.Y.2d 100, 491 N.E.2d 676, 500 N.Y.S.2d 503 (1986); *Burrell v. McMann*, 51 Misc.2d 185 (N.Y. Sup. Ct. 1966); N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). Furthermore, a collateral attack, on an issue such as newly discovered evidence, undermines confidence in the outcome of the trial as readily as issues raised on direct appeal based on the trial record.

The relief granted to Johnson by the New York Court of Appeals was the only appropriate remedy under the circumstances. In Johnson's case, as in *Rivera*, the trial transcript is unavailable, witnesses are deceased, trial counsel is unavailable and the complainant cannot be found. However, unlike in *Rivera*, Johnson was able to raise the existence of appealable issues in his first trial — specifically whether his confession was obtained via coercion and subsequently illegally introduced as evidence. Thus, the proper remedy in *Johnson* was vacatur and dismissal of the indictment, while in *Rivera*, where no appealable issues were demonstrated, a new trial was properly ordered.

Thus, the Mississippi Supreme Court misinterpreted New York law by deeming Johnson's 1986 attack on his New York conviction as collateral. While his petition was initially so styled, once the request for resentencing was granted, the case proceeded as a direct appeal of a criminal conviction.

B.

The Mississippi Supreme Court found that Johnson's 1963 conviction was final:

> If his crime was serious enough for him to have been convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction can be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals. *Johnson v. State*, DP No. 43 slip op. at 8.

The conclusion reached by the court has no basis in New York law. Johnson's conviction was not final because his appeal had never been perfected pursuant to N.Y. Crim. Proc. Law § 460.10 (McKinney 1983) — because of the State's action none of his appellate remedies had been exhausted. As the New York Court of Appeals found, based on undisputed records, "[Johnson's]

timely efforts to appeal were ... thwarted by the State." *People v. Johnson*, 69 N.Y.2d 339, 341.[9]

Indeed, facts found at a criminal trial cannot be used against the convicted defendant in a later civil action if he has been denied the right to an appeal. *Gelb v. Royal Globe*, 798 F.2d 38 (2d Cir. 1986). In that case, Gelb had been convicted of arson and mail fraud, served his sentence and his conviction was affirmed on appeal. However, the appellate court expressly refused to decide whether Gelb had set the fire in question. Because Gelb was denied an adjudication on appeal, the Second Circuit held that Gelb was not collaterally estopped from relitigating the issue of whether he had set the fire. Therefore, if the denial of an appeal precludes finality for purposes of a civil law suit, it should certainly preclude finality where the conviction is the basis of a sentence of death.

III. MISSISSIPPI'S ATTACK ON THE INTEGRITY OF THE PROCEEDINGS IN THE NEW YORK COURTS IS UNWARRANTED

The Mississippi Supreme Court sought to justify its failure to recognize the New York judgment by attacking the integrity of the New York proceedings as well as the conduct of the State's attorney. The Mississippi court wrote:

> [T]here is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial ... the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition. *Johnson v. Mississippi*, DP No. 43 slip op. at 8.

[9] The claim by the Mississippi Supreme Court that "there is nothing to suggest [that Johnson] took any steps to vacate this conviction until he filed this petition", *Johnson v. State*, DP No. 43, slip op. at 5, is inaccurate. As the record shows (see pg. 4 above) Johnson tried for years to have his conviction vacated.

The Mississippi Supreme Court's implication that the prosecution functioned as a rubber stamp for Johnson's defense is completely unsupported by the record. Precisely because he was concerned about "vouchsafing the validity" of Johnson's conviction, the prosecutor was careful to conform to professional standards in representing the state's interests in this case.

The role of a public prosecutor in a criminal proceeding is to search out the truth and insure a fair process. "[A prosecutor's] mission is not so much to convict as it is to achieve a just result." *People v. Zimmer*, 51 N.Y.2d 390 at 393, 414 N.E.2d 705, 434 N.Y.S. 206 (1980). *See also Berger v. United States*, 295 U.S. 78 (1935); *People v. Bolla*, 112 Misc.2d 703, 447 N.Y.S.2d 398 (N.Y. Sup. Ct. 1982). This is the national rule for prosecutors. *See also* ABA Model Rules of Professional Conduct, Rule 3.8 (1980), NYSBA Code of Professional Responsibility Canon 7, EC 7-13 (1970). The Supreme Court of Mississippi itself has stressed the role of the prosecuting attorney in ensuring fairness. "[I]n conducting a criminal case, the prosecuting attorney must be fair and impartial *and see that defendant is not deprived of any constitutional or statutory rights*". *Adams v. State*, 202 Miss. 68, 30 So.2d 593 (Miss. 1947) (emphasis in original).

In his papers in response to Johnson's 1986 *coram nobis* petition, the district attorney agreed only that Johnson had demonstrated that his right to appeal had been denied:

> We respectfully urge that petitioner has demonstrated that he was deprived of, and is now entitled to, his right to appeal. We flatly deny that the prosecution did anything to deprive him of any other right ... petitioner is not entitled to any other remedy. Affirmation of Melvin Bressler to County Court, Monroe Co., Indictment No. 32/1963, (Sept. 23, 1986) (A. 14-16).

The district attorney's response clearly demonstrates an interest in the proceedings and a desire to challenge some of Johnson's claims.

The Monroe County district attorney's position in the Appellate Division was consistent with his position in the county

court – that the petitioner had established his right to appeal the 1963 conviction. The district attorney also stated that Johnson's appeal was not barred by N.Y. Crim. Proc. Law § 460.30 (McKinney 1983), (see Sec II above) because that statute had been passed after Johnson had filed his *coram nobis* petition, conceding that subsequent changes in the law should not affect the rights Johnson had sought and was denied in 1963. (A. 17) The Appellate Division did not agree, and held the appeal to be time-barred. *People v. Johnson*, 125 A.D.2d 1008.

New York's highest court reversed the intermediate court and agreed with the prosecutor that petitioner's appeal was not barred:

> In these special circumstances, the People, *as they correctly concede*, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction. (*People v. Thomas*, 47 N.Y.2d 37.) *People v. Johnson*, 69 N.Y.2d at 341 (emphasis added).

Mississippi mistakenly asserts that the New York proceedings "lacked an essential adversarial ingredient." *Johnson v. State*, DP No. 43, slip op. at 8. Clearly, prosecutors may not be adversarial merely for the sake of a good argument:

> The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversarial element essential to the informed decisions of any controversary but being possessed on the other of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. *Professional Responsibility Report of the Joint Conference*, 44 ABAJ 1159, 1218 (1958).

In criminal proceedings, prosecutors have the duty to disclose to the defense and to the court any evidence available to them which "tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment." ABA Model

Rules of Professional Conduct, Rule 3.8(d), NYSBA Code of Professional Responsibility EC 7-13. Even after a conviction, a prosecutor is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, page 427, fn.25 (1976). The New York prosecutor comported with these standards in conducting an independent investigation of the case and informing the courts of his findings.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Mississippi.

Dated: New York, New York
October 16, 1987

Respectfully submitted

ROBERT ABRAMS
ATTORNEY GENERAL OF THE STATE
OF NEW YORK
120 Broadway
New York, New York 10271
(212) 341-2250

O. PETER SHERWOOD
Solicitor General

SUZANNE M. LYNN
SUSAN JACOBS
BARRY BASSIS
Assistant Attorneys General
Of Counsel

APPENDIX

NOTICE OF APPEAL

COUNTY OF MONROE
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—vs.—

SAMUEL BICE,

Appellant.

Sir:

Please take notice that Samuel Bice, the Appellant herein, hereby appeals to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department from a judgment rendered in the Monroe County Court on the 9th day of April, 1963 convicting appellant of Assault in the Second Degree, and appellant hereby appeals from said conviction, from every part and from the whole thereof.

Dated: Attica, New York
January 16, 1967

Sworn to before me this
16th day of January, 1967

Respectfully submitted,
Samuel Bice
Appellant in Pro Se
Box 169, Attica, N.Y.

Notary Public
Ralph Y. Bittone

Clerk of Monroe County Court
Civic Center Plaza
Rochester, State of New York

Box 149
Attica, N.Y. (14011)
Date January 16, 1967

Samuel Bice 22616.

This Appeal is not timely.

Do Not Get out the record at this time.

s/John R. Reardon

THE PEOPLE OF THE STATE OF NEW YORK,

—vs.—

SAMUEL BICE,

Appellant.

---

to Appellate Division Fourth Judicial Department

Honorable Sirs:

The appellant, Samuel Bice, was indicted by the Monroe County Grand Jury for the crime of Assault in the Second Degree on or about the 25th day of February, 1965, and does not know the indictment number.

Hereafter a jury trial was had in the Monroe County Court on said charge of Assault in the Second Degree and a verdict was rendered on or about the 28th day of March, 1965 finding appellant guilty as charged in said indictment.

Appellant feels that there is merit to his cause of action in that his Constitutional rights were violated (1) that appellant was not informed at the time of his arrest of his right to remain silent and that anything appellant said could be self incriminating (2) that was no probable cause for his arrest (3) that the verdict as rendered by the trial jury was against the weight of evidence and that the error in denying appellant motion to dismiss at the close of the people's case.

Wherefore appellant prays for an order of this honorable Court granting him permission to appeal as a poor person from the judgment of conviction entered in the Monroe County Court on the 9th day of April, 1968.

Sworn to before me this
16th day of January 1967

Respectfully submitted

s/Samuel Bice

Appellant in Pro Se
Box 149, Attica, N.Y.

Notary Public
Ralph Y. Bittone

WRIT OF CORAM NOBIS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

—vs.—

SAMUEL BICE,

Defendant.

New Yo.': State)
County of Monroe) ss:
City of Buffalo)

Samuel Bice, being duly sworn deposes and says that he is the petitioner herein and makes this Notice for a Writ of Error Coram Nobis, for the relief sought herein Pro-Se, that he is fully aware of the facts and allegations herein based on the trial records of this Court.

The Defendant was held at Elmira Reformatory at Elmira, New York upon verdict of guilty after trial. Defendant was sentenced by Honorable Judge John P. Lomenzo, on or about April 4, 1963 to a term of from 1½ years to 3 years in Elmira Reception Center at Elmira, New York which term Defendant has already served.

Your Defendant's contentions are that no appeal was ever filed on behalf of Defendant's Rights to Appeal.

Petitioner relies upon the Doctrine of *People v. Montgomery*, 24 N.Y.2D 130; *People v. Callaway*, 27 N.Y.2D 127; also *People v. Ransey*, 23 N.Y.2D 656; *People v. Sillivan*, 32 A.D.2D 514, *People v. Sacharske*, 31 A.D. 892; *People v. Stewart*, 26 A.D. 2D 842, *People v. Winslow*, 31 A.D.2D 561, see also *Rodrigues v. U.S. Supra*, Rule 32 of Criminal Procedure for the United States District Courts.

The Court of Appeals recently stated on this issue that every Defendant has a fundamental right to appeal his conviction. Basic Fairness and Due Process require that said right not be dissipated because the Defendant was either unaware of its existence, or because counsel did not abide by a promise to prosecute an appeal. When an attorney fails to appraise his client of this vital privilege, there is no satisfaction for having the Defendant suffer from his attorney's failing. *People v. Montgomery, supra,* and *People v. Allaway, supra.*

The New York State Court of Appeals has recently stated on this issue that every defendant has a fundamental right to challenge the constitutionality of his conviction. Basic Fairness and Due Process require that said right not be dissipated because the Defendant was either unaware of its existence, or because counsel did not abide by a promise to prosecute an appeal. The Courts insist that defendants be informed of their basic right to appeal. When an attorney fails to appraise his Writ of this vital privilege, there is no justification for making the defendant suffer for his attorney's failing. *People v. Montgomery, supra, People v. Callaway, supra.*

Wherefore petitioner prays that this Honorable Court will grant the relief sought herein and any other relief this court will deem just and proper.

Sworn to before me
this 3rd day of January, 1971
s/
Notary Public

s/Samuel Bice
Samuel Bice #62405
Petitioner Pro-Se

Monroe County Court
Clerk's Office
Rochester, New York 14610
454-7200, Ext. 224

January 13, 1971

Mr. Samuel Bice, #62405
135 State Street
Auburn, N. Y. 13022

Dear Sir:

This acknowledges receipt of your letter of January 5th, 1971 enclosing your application for a Writ of Error, Coram Nobis, verified on the same day.

Be advised that this matter has been placed on the Motion Calendar for February 17th, 1971.

Very truly yours,

Howard T. Eichorn
Chief Court Clerk

HTE:c

cc: District Attorney

Monroe County Court
Clerk's Office
Rochester, New York 14610

NOTICE TO DEFENDANT
SAMUEL BICE

Pursuant to Rule X, subdivision 3 of the Appellate Division, Fourth Department, effective September 1st, 1967, you are hereby advised that it reads as follows:

3. Notification to Defendants Who Appear Without Counsel

A. After conviction or denial of Coram Nobis.

If a defendant has appeared pro se, the Trial Court shall advise a defendant of his right to appeal and of the right of a person unable to pay the cost of an appeal to apply for leave to appeal as a poor person. If the defendant so requests, the clerk of the Court shall prepare and file and serve forthwith a Notice of Appeal on behalf of the defendant.

Dated: Rochester, New York
9th day of March, 1971

MONROE CONTY COURT
BY: JOHN R. REARDON
Chief Court Clerk

NOTE: A Notice of Appeal must be filed and served within 30 days after judgment of conviction or service of order appealed from.

Check one and return:

__✓__ I wish to appeal

____ I do not with to appeal.

s/Samuel Bice
Defendant

Monroe County Court
Clerk's Office
Rochester, New York 14610
454-7200, Ext. 224

March 12, 1971

Mr. Samuel Bice #62405
135 State Street
Auburn, N. Y. 13022

Dear Sir:

Receipt of your request that this office file a Notice of Appeal in your behalf is hereby acknowledged. The Notice of Appeal was filed and served on the 12th day of March, 1971.

Very truly yours,

s/ Howard T. Eichorn
Howard T. Eichorn
Chief Court Clerk

HTE:c

PEOPLE OF THE STATE OF NEW YORK,

Respondents,

— vs. —

SAMUEL BICE,

Appellant.

SIRS:

PLEASE TAKE NOTICE, that the Defendant-Appellant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an Order of Monroe County Court, Edward O. Provenzano, J., denying an application for a Writ of Error, Coram Nobis, entered in the Office of the Clerk of the County of Monroe on the 5th day of March 1971.

This Notice of Appeal prepared, filed and served at the request of Samuel Bice, defendant, Pursuant to Rule, Subdivision 3, Appellate Division, Fourth Department.

BY: HOWARD T. EICHORN
County Court Clerk
Monroe County

TO: District Attorney* NYSIIS #778268X
201 Hall of Justice
Rochester, New York

Monroe County Clerk*

* Names are illegible in original.

STATE OF NEW YORK
COUNTY COURT, MONROE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

— against —

SAMUEL BICE JOHNSON,

Defendant-Petitioner.

Indictment No. 32 (1963)

STATE OF NEW YORK)
: ss.:
COUNTY OF MONROE)

AFFIDAVIT OF EDWARD J. NOWAK

Edward J. Nowak, being duly sworn, deposes and says that:

1. My name is Edward J. Nowak and I am the Public Defender of the County of Monroe, New York. I maintain an office in the Executive Office Building, 10 North Fitzhugh Street, Rochester, New York 14614. I submit this Affidavit in support of petitioner's motion to vacate judgment of conviction.

2. Prior to my being appointed Public Defender in April, 1977, I was Chief of the Appeals Bureau in the Office of the Public Defender, from 1976 to April, 1977. For a period of some years, centering around 1970-71 and thereafter, the Office of the Public Defender came under intense public criticism for the inadequacy of its representation of indigent defendants. The office at that time was severely under-funded and under-staffed. By 1971, the quality of representation provided by the Office had deteriorated to the point that, in 1972, the Monroe County Legislature contracted with the National Legal Aid and Defender's Association to evaluate the quality of its representation of indigent defendants. The resulting report was severely critical of management, administration, and services provided by the Office during the 1971-73 period.

3. I have reviewed the papers submitted by Samuel Bice Johnson in support of his motion to vacate his conviction by this Court in 1963 for second degree assault. It is my opinion, based on many years of representing criminal defendants in Monroe County and in the Supreme Court of New York, Appellate Division, 4th Department, that a court of competent jurisdiction in New York very likely will declare Johnson's conviction invalid and unconstitutional as a matter of law, and will issue an order vacating such conviction.

4. The grounds for relief alleged by Johnson are meritorious and present important issues under the laws of New York and the United States Constitution. Any one of Johnson's principal claims -- custodial interrogation without presence of counsel, absence of post-conviction hearing to determine the voluntariness of his confession, failure of this Court to advise him of his right to appeal, and the State's failure to provide competent appellate counsel -- is in my judgment sufficient ground to vacate the 1963 conviction. Together the grounds present an argument for post-conviction relief which, in my judgment, a New York court will find highly compelling.

5. Johnson's case is particularly compelling given that the State of New York has lost or destroyed critical records pertaining to the 1963 conviction, including the trial transcript, the jury instructions and the purported confession made by Johnson. It is beyond dispute that a New York court will at the very least set aside the 1963 conviction and order an evidentiary hearing as mandated by *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), to examine the issues raised by Johnson. It is my judgment, however, that the 1963 conviction should and will be vacated, given the seriousness and fundamental nature of the constitutional error demonstrated by Johnson, together with the irremediable prejudice to his rights caused by the State's loss of essential trial records, and the fact that Johnson has already served his prison term for a conviction infected with constitutional error.

6. Johnson alleges that he received ineffective assistance of appellate counsel from this Office with respect to proceedings

for post-conviction relief in 1971-72. I understand from examination of the records of this Office, and from information received from the Clerk's office of the Supreme Court of New York, Appellate Division, 4th Department, that in 1971 Johnson filed a Notice of Appeal. Upon docketing Johnson's appeal, the Appellate Division, 4th Department, appointed the then Monroe County Public Defender, Nicholas Varlan, to represent Johnson in this appeal. However, for reasons of which I am not aware, but which surely were related to the difficult conditions under which the Office labored during that time, Johnson's appeal was never acted upon in any way by the Public Defender's Office.

[CONFORMED COPY; EXECUTED AND NOTARIZED JULY 30, 1986]

EDWARD J. NOWAK

Sworn and Subscribed to
before me this ____ day
of July, 1986

Notary Public

AFFIRMATION

State of New York
County of Monroe
County Court

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

— vs —

SAMUEL BICE JOHNSON,

Petitioner.

I. Melvin Bressler, an attorney admitted to practice in this state, affirm, under penalty of perjury, that the following statement is true to the best of my knowledge.

A. History and Background

1. I am an assistant district attorney in Monroe County, NY, and I have familiarized myself with the history and prior proceedings in this case. I made this affirmation in response to the *coram nobis* application (CPL 440.10) made by petitioner and pending before the court.

2. Petitioner was convicted of assault under the former penal law in 1963. He now seeks post-conviction relief claiming that he was not afforded his right to appeal from that conviction, and also that a statement by him was improperly used against him at his trial in 1963.

3. Petitioner further claims that the records of his trial, most importantly including a trial transcript, have not been preserved.

4. Based on the affidavits provided by Petitioner, it is clear that petitioner never timely filed a notice of appeal. That failure in turn resulted in the trial minutes not being transcribed. The court stenographer is deceased, and it does not appear that his notes were preserved.

5. It also appears clear that no motion for a bearing to test the voluntariness of petitioner's statement was made before or during his trial.

B. The Present Petition.

6. Based on the affidavit of petitioner's former trial attorney, as well as the attorney for the petitioner's co-defendant, we accept the fact that petitioner was not properly informed of his right to appeal, in 1963. That being so, we urge that this court can remedy that error by vacating the sentence and ordering petitioner resentenced so that he can commence an appeal now. If that is done, we believe that each of the claims petitioner now makes can be dealt with in the appeal.

7. Having concluded that petitioner was entitled to an opportunity to appeal, we so informed petitioner's counsel, assuming that would end the necessity of this proceeding. Petitioner's counsel has written to the court arguing that petitioner is inste ad entitled to have the conviction vacated on the grounds stated in the Petition.

8. We disagree that: petitioner is entitled to any other relief based on the papers before the court.

9. When examined carefully, it becomes clear that petitioner's real complaint is that he was ineffectively represented by his attorney during the pre-trial and trial stages of his prosecution.

9. There is no allegation that petitioner ever moved for suppression or in any way called to the trial court's attention a complaint about the statement made by petitioner. There was certainly no requirement that either the court or the prosecution do anything other than what they did. We realize that the trial

was held before this area of the law and this right of a defendant was fully determined by the courts. Nevertheless, no legitimate claim can be made (or is being made) that any agent of the state deprived petitioner of any right. That being so, petitioner is simply not entitled to any relief on that ground. His remedy, if any, is that his attorney did not fully inform him of his rights.

10. If, in fact, petitioner makes such claim, it stands on considerably different footing than a claimed deprivation by the state of some fundamental right. Petitioner would first be required to show his attorney failed to properly represent petitioner in some way, and next that this "failure" contributed to the conviction.

11. All that is before the court presently is an affidavit saying that a statement by petitioner was used at his trial by the prosecution, and a claim that this use was improper. Accepting these statements as true, that is not enough. Petitioner must also show why that issue was not presented to the trial court, which has not been done. The implication -- unstated -- is that this was a failure of his right to effective counsel.

12. We respectfully urge that petitioner has demonstrated that he was deprived of, and is now entitled to, his right to appeal. We flatly deny that the prosecution did anything to deprive him of any other right. On the papers before the court, petitioner is not entitled to any other remedy.

WHEREFORE, we respectfully ask the court to afford petitioner his right to appeal, and to otherwise deny his petition.

Affirmed under penalty of perjury,
September 23, 1986.

s/Melvin Bressler

COUNTY OF MONROE
Office of the
DISTRICT ATTORNEY

HOWARD R. RELIN
DISTRICT ATTORNEY
TELEPHONE 716-428-5680

November 28, 1986

Appellate Division,
Fourth Judicial Department
301 Hall of Justice
Rochester, NY 14614

Re: Samuel Bice Johnson; pending motion.

May it Please the Honorable Court:

Samuel Bice was tried and convicted, with a codefendant after a jury trial of assault, second degree, under the former Penal Law, in 1963. Bice now uses the name "Johnson" and we will so refer to him.

Johnson was not advised of his right to appeal from that 1963 conviction. It is not clear what happened to his purported Notice of Appeal, but the then clerk of the County Court concluded, correctly, that the Notice was untimely, and directed that the transcript not be prepared (see Appendix at A 32).

We agree with the defendants' contention that he had the right to appeal from that conviction, and was entitled to be resentenced so he could take an appeal (*People v Montgomery*, 24 NY2d 130). Although the law today may be different (see, e.g., CPL 460.30-1), we believe that any later changes could not affect the rights Johnson had in 1963.

In August, 1986, Johnson moved for post-conviction relief (CPL 440.10) in Monroe County Court, seeking various forms

of relief from the 1963 conviction. Apparently agreeing that Johnson had the right to appeal, the court granted a portion of his motion, and resentenced him. He has filed a Notice of Appeal from that resentence, and has also moved for summary judgment, on that grounds that there is no trial record worthy of the name, and that reconstruction of the trial is impossible. We respectfully submit this letter in place of a formal memorandum in response to the pending motion.

Based on our own investigation, we agree with defendant's contention.

The court reporter has died, and, as noted above, there is no trial transcript. We tired to locate the victim and the co-defendant, and were unsuccessful. We turned such records as we had over to defense counsel prior to the coram nobis application; those records by no stretch of the imagination would enable counsel to prepare an appellate argument. Our records are incomplete, but on information and belief, the trial judge and prosecutor are also deceased. Current counsel for Johnson has contacted the former attorneys for both Johnson and his co-defendant. Their affidavits are part of the appendix (A 8; A 11), and they each have said they cannot remember sufficient details to reconstruct the trial.

The determination of the motion for summary judgment is of course addressed to the court's discretion. We are unable to provide any additional information that would aid the court in its exercise of that discretion. We would respectfully point out however, that we have no reason to believe that a hearing would develop any additional information.

Respectfully Submitted,

HOWARD R. RELIN
District Attorney of Monroe County

s/Melvin Bressler
By: Melvin Bressler
Assistant District Attorney

MB/lb
cc: Laurence Sorkin, Esq.